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IN THE

Supreme Court of the United States

October Term, 1970

No. 1211

TRAVIS LEVY,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Travis Levy prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 14, 1970.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. It is reprinted as Appendix "A" hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on October 14, 1970. A timely petition for rehearing and for rehearing *in banc* was denied on November 11, 1970. The

judgment of the Court of Appeals and the orders denying rehearing and rehearing *in banc* are reprinted as Appendix "B", *infra*. Under date of December 7, 1970, Mr. Justice Harlan granted petitioner an extension of time to January 9, 1971, to file the petition for certiorari herein. The jurisdiction of this Court is invoked under Title 28, United States Code, (1254(1).

Questions Presented

1. Whether it was constitutionally proper for Itkin, a government agent acting in the performance of assigned duties in this case, to be characterized and treated by the government as a co-conspirator. Whether Itkin's claimed criminal conduct and trial testimony as a purported co-conspirator was binding on petitioner Levy, thereby permitting the jury to convict on such testimony alone.

2. Whether it was prejudicial to petitioner Levy for the trial judge to permit Itkin to testify on redirect examination as to his so-called "state of mind" during his claimed, but unsupported, criminal activities in alleged contravention of his assigned duties. Whether Itkin's narration on redirect examination of highly inflammatory and prejudicial matters concerning his self-styled "mission" to infiltrate the "underworld", which was ostensibly related to the jury solely on the issue of Itkin's "credibility", was grossly prejudicial to Levy.

3. Whether the charge of the trial judge was complete and fair in material respects, especially in light of petitioner's specific written requests to charge the jury and exceptions taken to the charge. Whether this Court should resolve the conflict among the circuits as to the proper jury instructions to determine a defendant's participation in a criminal conspiracy.

Statutes Involved

Title 18, United States Code

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.

(a) Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer and of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned

not more than three years, or both: Provided, that this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act, as amended, and (b) "employee organization" and "administrator" as defined respectively in section 3(3) and 5(b) (1) and (2) of the Welfare and Pension Plans Disclosure Act, as amended.

STATEMENT OF THE CASE

The Indictment

Petitioner Levy was named in all three counts of the indictment. Count one alleged generally a conspiracy among defendants Levy, James Plumeri and Frank Zulferino, with co-conspirator Shiah Arsham (the principal officer of Cashmere Corporation of America, Ltd.), to violate §1954 of Title 18, United States Code, in that these defendants would "unlawfully, wilfully and knowingly, directly and indirectly, give, offer and promise to give and offer, a fee, kickback, commission, gift, loan and money and other things of value to the defendant Frank Zulferino, an officer, counsel, agent and employee" of Local 10 of the International Brotherhood of Production, Maintenance and Operating Employees, which had a wel-

fare benefit plan and employee pension benefit plan, with intent to influence the actions and decisions of Mr. Zulferino, in a mortgage loan application submitted by Cashmere Corporation of America, Ltd. Count one separately alleged an identical conspiracy to pay a kickback to one deceased Floyd Webb, a trustee of an employee welfare benefit plan and pension plan of the Central States, Southeast and Southwest Areas Pension Fund, also with respect to an application for a mortgage loan by Cashmere.

Count two of the indictment realleged as a separate conspiracy the allegations of count one, insofar as they charged the alleged conspiracy to pay a kickback to co-defendant Zulferino. Count three alleged as a separate conspiracy the alleged kickback to the deceased trustee Floyd Webb of the Central States pension fund, with co-defendants Samuel Berger, Yvette Feinstein and Robert Graff named as additional defendants. In all three counts of the indictment only Mr. Arsham was named as a co-conspirator.

The Record

The record consists of the complete transcript of the trial and an appendix submitted by co-defendant Berger.

The Facts

In light of the fact that petitioner Levy's conviction on count three was reversed by the court of appeals and he was ordered acquitted on that count, the only reference to facts will be in connection with count two, the affirmed count.[1] See however, the separate petition for certiorari by co-defendant Berger (No. 1090, O. T. 1970).

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[1] Count one was dismissed by the trial judge at the conclusion of the government's case. During the trial defendant Zulferino's counsel died, and defendant Plumeri became ill. Both were severed from the trial.

The facts of this case relate to the efforts of Cashmere Corporation of America, Ltd., to procure much needed financing to stay in business. The net result of efforts to procure a loan of $1,500,000, were finally successful when the Central States, Southeast and Southwest Areas Pension Fund made such loan on the security of a real property mortgage and other collateral.

In the late spring of 1964, Cashmere's financial position was desperate. Cashmere's president, Arsham, had come to New York to see the firm's New York attorney, petitioner Levy. Mr. Levy had been the attorney for Cashmere since 1961. In May or early June, 1964, Mr. Levy mentioned Cashmere's need for financing to Stephen Birnbaum, a mortgage broker. Birnbaum told Levy, and later Arsham, that Herbert Itkin, a labor attorney who represented a number of labor unions with pension funds, might be able to obtain a mortgage loan from one of these funds, for a 10% commission. Birnbaum maintained his brokerage office in Itkin's law office suite.

Levy and Arsham met with Birnbaum and Itkin on June 23, 1964, at which time a written agreement was signed, providing for a 7% commission if Itkin were able to obtain a 15 year 6% mortgage of $1,500,000. By separate written agreement, Birnbaum was to receive an *additional commission of 3%*. Arsham gave Itkin a check for $20,000 advance commission, although both Arsham and Levy wanted this money held in escrow. Itkin refused the escrow arrangement and demanded cash, but neither Arsham nor Levy would agree to this. The trial record supports Mr. Levy's contention that he refused to deal with Itkin except upon proper papers, payment by check and a completely legitimate deal.

Nothing of consequence transpired on this loan application until the end of September, 1964, when the Welfare Fund of Local 10 issued a written commitment to lend

Cashmere $1,200,000. However, the commitment, which Cashmere accepted on October 6, 1964, was for 10 years at 6½% interest, and required interim financing. The Local 10 fund did not have either money or credit to make good this loan—it was not "bankable". Later, Cashmere borrowed $70,000 from the welfare funds of Local 10 and a Local 875, with the latter union supplying most of the money. The principal loan from Local 10 never was completed, and Arsham had to turn elsewhere to obtain his financing. Itkin took an additional $10,000 for his part in arranging the $70,000 loan.

The prosecution witnesses Birnbaum and Arsham, both alleged to be co-conspirators by the bill of particulars, testified in detail as to their knowledge of the facts of the Local 10 proposed loan, and nowhere in their testimony is there any hint or suggestion that any part of the funds was to be used for an illegal payoff or bribe to co-defendant Frank Zulferino, an official of Local 10. The substance of their testimony is that this loan transaction was completely honest, based upon written agreements and the use of checks, not cash, to transfer funds or to pay the finder's commission. It was Itkin alone, who, by his testimony characterized this transaction as criminal. He testified that he gave money to Zulferino, and to co-defendant Plumeri, whose position in the transaction was never fully explained, but left mainly to surmise, conjecture and innuendo. In his testimony, Itkin relied mainly on dialogue reminiscent of old gangster movies one sees on the "Late Late Show" on television.

Itkin testified as a co-conspirator, although not named as such in the indictment. He narrated hearsay statements, and his purported criminal conduct (allegedly beyond the scope of his employment by the Federal Bureau of Investigation and ostensibly contrary to explicit instructions not to engage in criminal activities) was treated

as the only criminal proof of the conspiracy charged in count two of the indictment. Itkin testified that he lied to Agent Vericher of the FBI in reports he filed about this case. He also testified that he stole money here and in many other transactions not related to this case. None of this testimony was corroborated.

Itkin testified that he resented and disliked Levy, especially because Mr. Levy refused to allow Arsham to pay him in cash, and on one occasion required a promissory note to be signed for the second payment of $10,000. As to Levy, the sole testimony against him was that of Itkin. Even this was mainly conjecture and innuendo. Itkin said that whenever anyone came to him for a union fund loan, that person knew beforehand (even though Itkin did not necessarily tell them so) that the transaction was illegal and involved "pay-offs". Arsham and Birnbaum did not so testify, and never conceded knowing this to be so. Itkin testified that he told Mr. Levy as much; but that is all there is in the record as to Mr. Levy's knowing participation in a criminal conspiracy. Mr. Levy played no part in Itkin's activities.

Itkin narrated about a series of meetings with co-defendants Zulferino and Plumeri, neither of whom had ever met Levy. The substance of these narrations was the whole criminal case against Levy, who had no part in these meetings and was not shown to have participated in or have knowledge about them. There was absolutely no corroboration of Itkin's testimony as to any criminal activity in this case.

The heart of the government's case was the testimony of Itkin. Mr. Itkin is the current favorite government witness and he is becoming very prominent (in a way) for his roles in several cases of great public interest. Mr. Itkin has already testified in a number of cases, and the records of the District Court for the Southern District of New York disclose that he is a witness, or prospective

witness, in several pending cases.[2] In this case, Itkin spent a number of days on the witness stand. His style of testifying can easily be gleaned from the record, and where, as here, the trial judge did little to restrict or control him, he glibly talked endlessly. There is no doubt that he is a very clever man.

During his cross-examination by Levy's trial counsel, he told the jury, although not asked, that he was "infiltrating" (ostensibly the underworld) as an undercover agent for the FBI (S. M. 1688); when asked about his failure to file income tax returns, he managed to say: "But if they knew that, my life would be in danger, so I couldn't let them know" (S. M. 1688-1689). The latter comment was then stricken from the record. At one point earlier, he was asked about his reports to agent Vericher of the FBI (S. M. 1587). This is how it went:

> "(*By Mr. Bender*)
>
> Q. Did you make any other report between these times? A. I am saying the reports have to speak for themselves. I can't say whether I did or didn't. I reported to him on a million things during this period. If these are when his reports are, then that has to be.
>
> Q. You have no independent recollection? A. Of course not. I was reporting daily on several different things.
>
> Q. And did you report daily also on the Cashmere situation? A. I can't attest to any particular one. We had many crimes going on at the time.
>
> Mr. Bender: I move to strike that out, your Honor.

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[2] These cases bear docket Nos. 68 Cr. 434; 68 Cr. 467; 68 Cr. 477; 68 Cr. 614. These cases are in addition to the *Marcus* case (413 F. 2d 1306) and the recent *DeSapio* case. There may be others of which counsel is unaware.

Mr. Greenberg: Your Honor

The Court: I will grant that motion.

Mr. Greenberg: I would like your Honor to give the jury an instruction about this, if your Honor please.

The Court: Yes.

Ladies and gentlemen, that remark will be disregarded. The fact that the witness mentions the word 'crimes' doesn't mean that there were crimes committed. The only issue before you is whether or not the government in this case establishes beyond a reasonable doubt that these specific crimes alleged were committed by these defendants.

Mr. Rosenthal: Your Honor, on behalf of the defendant Berger I respectfully move for the withdrawal of a juror and the declaration of a mistrial.

Mr. Greenberg: I join in that.

Mr. Bender: I join in that, too.

The Court: Denied. And I don't think that the witness was too far off in responding. You were kind of asking

Mr. Greenberg: I take exception to your Honor's remark and move for a mistrial.

Mr. Rosenthal: I renew my motion.

The Court: Let me point out what I meant.

Mr. Greenberg: This witness is a lawyer. He knows what he is doing sticking in things that have no place in this case.

The Court: Just a moment, Mr. Greenberg. I think that when counsel go into an area of this sort with full knowledge of many facts, they can not then pick and choose.

Mr. Greenberg: I submit, your Honor, he was asked a specific question about rendering a report

about this case to the FBI between two dates and he did not invite the answer he got, and I submit that it is misconduct by this witness.

The Court: The record will show what he was asked. And I think if you will examine it you will find that there was a basis for the remark I made.

Proceed, Mr. Bender.

Mr. Bender: I will join in the exception, most respectfully, taken by Mr. Greenberg.

The Court: My ruling will be the same."

Thus, although the trial judge instructed the jury to disregard Itkin's remarks he immediately undid his admonition by telling the jury that Itkin was somehow justified, or that there was a "basis" for his remarks.

The record is replete with many other examples of Itkin's tactics, which were condoned or approved by the judge.

However, the worst was yet to come. At several points the trial judge stated on the record that Itkin's "state of mind" was being probed, by reason of questions attacking his credibility, and that on redirect examination by the prosecutor he would permit an inquiry into Itkin's "state of mind". See S. M. 1778-1830. The first question of substance by the prosecutor, to which objection was made and sustained before the full question was put, was:

> "Q. Is it not a fact, Mr. Itkin, that you had a mission to infiltrate certain . . ." (S. M. 1779).

At the side-bar, the trial judge then stated he would allow redirect examination on questions as to why Itkin lied to FBI Agent Vericher (S. M. 1781).[3] Objection by all counsel was noted to this line of inquiry. The trial judge also

[3] It is only Itkin who says he "lied" to the FBI; there was no corroboration of this contention.

undertook to instruct Itkin at the side bar not to use such words as "Mafia," "organized crime" or the like, in his answers on redirect examination. See S. M. 1785-1787, and especially the objection by Mr. Rosenthal, trial counsel for Berger, to the court's ruling and instructions on this matter, in which all other counsel joined.

Thereafter, over objection Itkin was permitted to testify as to his conversations with and his statements to FBI agents and his meanings in such conversations (S. M. 1789), finally leading to this testimony:

> "A. Infiltrate, infiltrate, but there is, since one of the requirements of my taking on the work I am doing was that eventually I would testify, which makes everything worthwhile, and my testimony is the basis for infiltrating, it is one thing to get intelligent information. It is another thing to stand up and actually testify as to what you have found out, and if I state too much on the witness stand, too much on the fringe of what I was doing, then I would be only able to testify as to what I thought happened. In order to be able to sit on the stand and testify as to what happened I had to be in the center of it, and so since I knew that we were at two different points, the FBI had rules and regulations, but I was also told what my original mission was, and I had to fulfill that mission and that was the two-fold mission, one to infiltrate, find out exactly what was happening, and the second phase of it, very definitely was to be able to take the stand and testify as to what I had found out in those five years.
>
> (*By Mr. Rooney*)
>
> Q. But you said also on cross-examination that you concealed various things from Agent Vericker; correct? A. Yes, I did, sir.

Q. Not only that, but you lied to him on many occasions; is that correct?

Q. Why did you lie?

Mr. Rosenthal: I object to why he lied.

Mr. Bender: Objection.

The Court: Overruled.

A. I lied for two reasons. One is that, as in this case, I lied to him in June of 1986. My part of the involvement was to a great extent over. Mr. Vericker had one overriding concern and that was more important than anything else and he always judged what we did by the concern for my life and ——

Mr. Bender: Objected to, your Honor.

Mr. Greenberg: Wait a minute.

The Court: Overruled.

Mr. Greenberg: Your Honor, there is nothing

The Court: Are you objecting?

Mr. Greenberg: There is nothing in all of the cross-examination, not one thing in all of the cross-examination that has been going on ——

The Court: Are you objecting?

Mr. Greenberg: Your Honor, this is so highly prejudicial——

The Court: Are you objecting?

Mr. Greenberg: Yes, sir, I object, your Honor.

The Court: Overruled.

Mr. Greenberg: I move for a mistrial, your Honor.

The Court: Denied.

Mr. Rosenthal: I also object and move for a mistrial.

Mr. Bender: I join in that motion.

The Court: Denied.

Mr. Greenberg: I have not been permitted to state my reason. I want the record to reflect that.

The Court: You will have ample opportunity to do that. You have just stated so much of this is at the side bar. Proceed."

After Itkin completed this line of testimony, appellant Levy's trial counsel moved to strike the testimony (S. M. 1795), which was denied. The Court then added:

"Ladies and gentlemen, this testimony of the witness is not received for the truth of what was said either by the witness or by third persons but solely on the issue of his credibility. On cross-examination he was asked certain questions as to why he did certain things and his state of mind. I am permitting the government on redirect to explore that solely on the question of credibility. What the witness said to somebody about the matter or what the FBI said to him about it is not evidence as to the truth of what was said, but it is evidence pertaining to the witness's state of mind and it will be up to you and you alone to determine at the conclusion of the trial the credibility of the witnesses and the weight that you extend to the testimony given by each.

Mr. Rosenthal: I most respectfully object to the statement and except to the statement your Honor just made that the witness was asked on cross-examination as to why he made certain statements to the FBI, and I respectfully submit that it is not your Honor's recollection but it is the recollection of the jurors that controls.

The Court: With that I agree.

Mr. Rosenthal: My recollection of the cross-examination was not that he was asked why but he was asked if he had made certain statements to the FBI.

The Court: Ladies and gentlemen, of course it will be your recollection that will govern as to the facts in the case. My recollection was that the witness has been asked various questions as to his motivation and the reasons why he did certain things and based on that I am admitting this evidence on the very limited issue of his credibility as a witness. Overruled".

The redirect examination continued with more of the same type of testimony and comment from the trial judge, all over objection.

The Charge of the Trial Judge

In advance of the charge of the trial judge, petitioner Levy filed written requests to charge. These are set forth at S. M. 3332-3347. In particular, petitioner Levy invites attention to the following requests to charge submitted by him:

Request No. 9 (S. M. 3339).

"If you do conclude that a conspiracy as charged did exist, you must next determine whether a defendant on trial was a member. You must do so without regard to and independently of the statements, acts or declarations of the other alleged co-conspirators.

On this subject, a special word:

You will recall that the acts or statements of one alleged co-conspirator, done or said in the absence of other alleged co-conspirators, were admitted into evidence as to the absent alleged co-conspirators on a conditional or tentative basis. Such acts and declarations were received in evidence without lim-

itation against the alleged co-conspirator who did the act or made the statement. However, as to other alleged co-conspirators who were not present, such testimony was received subject to independent proof of the existence of the conspiracy and an absent defendant's knowing participation therein.

In other words, the alleged participation in the conspiracy by a defendant on trial cannot be established against him by what another alleged conspirator said or did in his absence.

Participation of each defendant in the conspiracy must be established by independent proof, based upon the reasonable inferences drawn from his own acts, his own conduct, his own statements or declarations, his connection with the acts and conduct of other alleged co-conspirators.

Adapted from Judge Weinfeld's Charge in *United States* v. *Coralle*, 67 Cr. 1051 (T. 2291-92)."

Request No. 10 (S. M. 3340-3341)

Mere Association of a Defendant with Conspirators

"Mere association of one defendant with an alleged conspirator or conspirators does not establish his participation in a conspiracy, if you find one did exist. So, too, mere knowledge by a defendant of the conspiracy or any illegal act on the part of an alleged co-conspirator is not sufficient to establish his membership in the conspiracy.

Adapted from Judge Weinfeld's Charge in *United States* v. *Coralle*, 67 Cr. 1051 (T. 2302)."

Request No. 11 (S. M. 3341)

"The Government must establish beyond a reasonable doubt that a defendant, aware of its pur-

poses and objects, entered into the conspiracy with a specific criminal intent, that is, that the defendant knowingly did an act which the law forbids, purposely intending to violate the law; that there was an informed participation by him in an agreement or understanding which intended the commission of acts in violation of Section 1954 of Title 18, U. S. C., as I have elsewhere defined that statute to further the illegal activity.

Adapted from Judge Weinfeld's Charge in *United States v. Corallo*, 67 Cr. 1051 (T. 2303)."

Request No. 13 (S. M. 3344 3347)

"On behalf of the defendant Levy, the defense of entrapment has been offered. Simply explained, this defense means that no one acting as an agent of the Government, whether formally or informally, may induce the commission of acts which are charged as a criminal offense. Neither may such an agent induce the commission of acts or the making of statements by a defendant under deceptive circumstances so that those acts or statements may later seem to be, or give the appearance of having been made, in the furtherance of a criminal conspiracy. Finally, such an agent may not by his own acts, statements and testimony create a picture of guilt around otherwise innocent acts of a defendant.

In this case, the prosecution witness Itkin has testified that from the beginning of his contracts with the defendant Levy he was an informant of the F. B. I. or an informal F. B. I. agent. It has also appeared that Itkin retained considerable sums of money for the activities which he testified he engaged in in this case. Even if you find that

Itkin intended to make payments or offers of payments to officers, agents or employees of the Welfare Fund of Local 10, or any other welfare or pension benefit fund in connection with the mortgage application of Cashmere Corporation, and even if you further find that the defendant Levy participated in the processing of the application for a mortgage commitment with knowledge of Itkin's intention, you must nonetheless return a verdict of not guilty as to the defendant Levy if you find that the witness Itkin induced and enticed the participation of the defendant Levy so that he might at that time or later offer to the F. B. I. or any other government agency proof of an alleged offense by the defendant Levy.

You will also recall that there is evidence in the records, such as (1) the testimony of the witness Birnbaum, the witness Arsham, (2) the testimony of the witness Itkin, (3) in the form of letters and other documents concerning the mortgage application of Arsham's corporation and the role of Itkin as an attorney to secure the granting of that application and the funds for the mortgage, that the preparation of the mortgage application and supporting documents was done in a regular, normal and legal manner. Itkin also testified, however, that certain of these documents, regular on their face, and certain of the transactions, also ordinary and regular, were but a sham because, Itkin claims, he had other conversations and dealings with union representatives which allegedly reveal that the application for a mortgage commitments would only be granted and the funds provided for the mortgage if there was an illicit and undercover payment to a representative of the Union. You may

conclude from the evidence in this case that the defendant Levy, participating as an attorney for Arsham and the Cashmere Corporation, performed only acts normal for such an attorney to perform in such a situation, but that because of the acts that Itkin says Itkin himself performed and because of Itkin's testimony in this courtroom as to Itkin's own intended wrongdoing, that Levy was a participant in a scheme which has as its ultimate intended conclusion forbidden payments to Union and welfare plan officials. If you do draw such an inference from the evidence in this case, then you must acquit the defendant Levy because he will in that event have been found by you to have committed acts, innocent in themselves, which have been given a colorable or criminal connotation only because of the machinations of Itkin and the guise which Itkin adopted.

Because there is evidence in this case to support a defense of entrapment in favor of the defendant Levy, I further charge you that the burden of the prosecution is the same as to this defense as it is to any element of the crime charged, that is, it is the function of the prosecution to prove to you beyond a reasonable doubt that there was no entrapment of the defendant Levy in this case as I have defined it for you. Thus, if you draw the inference from the evidence that there was entrapment, or if you have a reasonable doubt that the defendant Levy was entrapped by Itkin, then you shall return a verdict of not guilty as to the defendant Levy.

Sorrells v. *United States*, 287 U. S. 435, 442-53, S. Ct. 210, 217 (1952);

United States v. *Sherman*, 200 F. 2d 880, 882-83 (2d Cir. 1952);

United States v. Puglisi, 346 F. 2d 861, 862-63 (2d Cir. 1965);
Sagansky v. United States, 358 F. 2d 195 (1st Cir. 1966);
United States v. Riley, 363 F. 2d 955, 958-9 (2d Cir. 1966)."

In his rulings on these requests, the trial judge first pointed to similar requests by co-defendant Feinstein (Feinstein Request No. 7) and declined to give such instructions (S. M. 3348). There were no specific rulings on the other requests, except that the court originally was uncertain as to whether or not he would charge on "entrapment" (No. 13) (S. M. 3348-3350).

With respect to Levy's Request No. 13, *supra*, on the defense of "entrapment", the trial judge charged on "entrapment" in the following language:

> "If you find that Levy knowingly participated in the conspiracy, the legal conspiracy charged in count 2, you would then consider the defense of entrapment which he has raised with respect to count 2 of the indictment. You have heard Itkin's testimony that at the time of the transactions he described he was acting as an informant or agent of the government. Under the law a defendant cannot be convicted of a crime if his commission of the crime is induced by an agent of the government and the defendant had no predisposition—in other words, if he was unwilling and needed persuasion by the government agent to commit the crime.
>
> If you should find from the evidence that before anything at all occurred respecting the alleged offense involved in this case Levy was ready and willing to enter into the illegal activities alleged whenever an opportunity arose, the accused, Levy, is not entitled to a defense of entrapment.

If, on the other hand, you should find that he had no previous interest or purpose or intent to commit any offense and did so only because he was induced or persuaded or talked into it, so to speak, by an agent of the government, then the agent has seduced, in effect, an innocent person and the defense of unlawful entrapment is a good defense and you, in that event, should acquit.

In considering that issue bear in mind that the burden is on the defendant to adduce some evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant Levy has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that is, that the defendant Levy was ready and willing to commit the offense.

In this case the government points out that it was not Itkin who initiated the Cashmere loan transaction. The Cashmere proposition was brought to Itkin by Birnbaum acting on behalf of Levy and Arshum. Itkin testified people brought such propositions to him only when they were desperate and could not get loans legitimately, and that Birnbaum knew of pay-offs from prior deals.

The defendant Levy, on the other hand, contends that although he may have brought the transaction to Itkin through Birnbaum he brought it to Itkin as a perfectly legitimate transaction and that it was Itkin who initiated the illegal union payments to union officials.

If you find the transaction was brought to Itkin with a view to a possible pay-off and that Itkin

did not initiate the idea of illegal pay-offs there would be no entrapment. If you find that it was Itkin, on the other hand, who initiated the illegal conduct, the government contends that it has nonetheless established beyond a reasonable doubt that Levy was ready and willing to enter into a conspiracy to make illegal payments. If you so find, then the defense of entrapment would fail.

Levy contends that there was no such willingness on his part. He points to his refusal to deal in cash or "green" as Itkin called it, and his initial desire to put the advance to Itkin in escrow, which would have the legal effect of freezing the money so that it couldn't be used by Itkin for any other purpose.

The government, on the other hand, contends that Levy in refusing to deal in cash and asking that the money be placed in escrow was merely trying to achieve the appearance of legitimacy. It points out that Levy assured Itkin that he would be able to convert the checks into "green" possibly in the Bahamas after the transaction was completed.

It further contends that there is nothing in the evidence to show that Levy protested when Itkin refused to place the money in escrow or that Levy attempted to disassociate himself from Itkin or needed persuasion to continue the transaction when he learned of the illegal payments to be made to union officials if, indeed, he did not know from the outset that such payments would have to be made due to the inability of Cashmere to obtain financing through legal channels" (S. M. 3613-3617).

Trial counsel for Levy took exception to this charge on "entrapment", citing to the court the decisions in *United*

States v. *Bair*, 407 F. 2d 905 (2nd Cir., 1969) and *United States* v. *Riley*, 353 F. 2d 955 (2nd Cir., 1966). See S. M. 3678-3680.

Trial counsel for Levy also noted a specific exception to the charge on "acts and statements of a co-conspirator" (S. M. 3669), as related to Itkin. Counsel stated that "the position I take is that no statement of Itkin and no act of Itkin made outside of the presence of my client can in any way be considered by the jury as evidence of any participation by my client in any conspiracy" (S. M. 3669-3670). Counsel continued:

> "I say that Itkin as a government informer and a government agent under no stretch of the imagination can be considered as a co-conspirator for the purpose of proving the existence of a conspiracy merely by his acts together with one other individual" (S. M. 3670-3671).

Specific exception to the failure to give specific instructions was met with the trial judge's comment that "you automatically have an exception to my failure to charge any of your requests" (S. M. 3671).

The Decision of the Court of Appeals

The court of appeals reversed the convictions of Levy and Mrs. Feinstein on count three of the indictment, while affirming Levy's conviction on count two and Berger's conviction on count three.

In its opinion, as to count two, the court wrote that there was "independent evidence" to support Itkin's testimony as to count two, and that it was proper to admit Itkin's testimony as that of a co-conspirator. Levy pointed out in his petition for rehearing that there was absolutely no corroboration or independent evidence of Itkin's testi-

mony of criminal conduct, and that admitting his testimony as that of a co-conspirator was inconsistently prejudicial. A government agent cannot be a criminal participant in a criminal conspiracy, and that whatever Itkin did in this case was as a government agent and not as a co-conspirator.

Reasons for Granting the Writ

This case involves the integrity of the administration of federal criminal justice on the part of the Department of Justice and the courts, through the use of a government agent acting as an *agent provocateur* and as the sole source of purported criminal conduct. The issues in this case transcend the ordinary problems of criminal prosecutions and more directly concern the whole concept of substantive due process of law. This Court's supervisory function over the administration of federal criminal justice is directly concerned herein.

1. It was not constitutionally proper for Itkin, a government agent, acting in the performance of assigned duties in this case, to be characterized and treated by the government as a co-conspirator. Itkin's claimed criminal conduct and trial testimony as a purported co-conspirator was not binding on petitioner Levy. The jury should not have been permitted to convict Levy on such testimony alone.

Itkin testified that he was employed by the government to investigate and report on the activities of the labor unions with which he was associated, and that as a part of his activities he confessedly engaged in criminal activities. But it is only Itkin who says that there was anything criminal about his activities and only he claims that he committed the criminal act of "paying off" the union official Zulferino. There is absolutely no corroboration of his testimony on these matters.

Although Itkin was not named in the indictment as a co-conspirator, he was so named in the bills of particulars filed in this case. Apart from the error in so naming him, it is really not possible for a government agent or employee acting as such, and making reports on his activities, to be classified and treated as a co-conspirator.

The concept of a co-conspirator not named as a defendant is a person equally culpable with the named defendants, but not charged criminally, for various reasons. The main reason is that such co-conspirator usually becomes a witness for the prosecution and is afforded either immunity or forgiveness from prosecution. The co-conspirator must be one who is in all respects, except for not being prosecuted, identical with the conspirator defendants. He must knowingly, willfully and intentionally be a member of the criminal conspiracy, with specific intent to violate the law by engaging in the conspiratorial conduct. He is not an innocent person. He is not "feigning" membership in the plot to carry out his police activities. Thus it is unheard of for the undercover agent to be charged in the indictment as a co-conspirator, thereby enabling or permitting his thoughts, deeds and intentions, his purported "state of mind", to be made part of the proof of the conspiracy.

Only Itkin testified to criminal conduct or activity as to count two. His purported criminal activities are not binding upon the defendant, even in the guise of conspiracy. The rule in *Caminetti v. United States*, 242 U. S. 470, 495 (1917) (the fountainhead of modern conspiracy prosecutions), that a defendant may be convicted on the uncorroborated testimony of a co-conspirator does not mean that the police agent is a co-conspirator and that his testimony that he bribed a person (constituting the only alleged criminal act in the conspiracy, and the act that makes the alleged conspiracy criminal) may be used to establish such conspiracy.

Analysis of the concept of conspiracy, a broad, sprawling, elastic term, whose dimensions are often indistinct, and which is mainly the product of judge-made law, is often extremely difficult. The basic premise of conspiracy is the agreement among the parties. The act of agreement, in terms of the "object dimension", tells us what the conspiracy is about; the "party dimension" includes the members thereof. Nowhere in the analysis of conspiracy, either as to object or party dimension, has the element of a police agent as a party to the illicit agreement been sustained. Moreover, it is a contradiction in terms that the police agent, acting as such, has joined in an agreement or venture to violate the law. Membership in a criminal conspiracy necessarily requires engaging in a criminal venture. Where the agent is acting in an undercover capacity, he lacks the requisite criminal intent. He cannot in such circumstance have any "stake in the success of the venture", as required by such definitional cases as *United States v. Falcone*, 109 F. 2d 579, 581 (2nd Cir., 1940, *per* L. Hand, C. J.), affirmed 311 U. S. 205, 210 (1940), and later cases.

It is not to be denigrated that the requirement of "specific intent" remains as essential element of the crime of conspiracy. See, Note, *Developments in the Law*, Criminal Conspiracy, 72 Harvard Law Review 920, 935-936 (1959). This element is lacking, where, as here, Itkin claims his principal function was to "infiltrate" (the underworld?). His testimony shows that he lacked the requisite criminal, or specific, intent to violate the law. Accordingly, he was not a member of the conspiracy alleged in count two of the indictment.

Although Itkin testified (without verification or support) that he lied to the FBI, evaded income taxes, stole money from clients and those he considered to be "unworthy", and that he agreed in substance that he was a thoroughly disreputable character, nevertheless that does

not make him, in this case, a co-conspirator. He was acting for the government throughout this case. Any other explanation of his conduct is at odds with the true facts and situation.

Thus, it is clear that this prosecution, based upon the purported criminal activities of the government agent Itkin, who alone says that there were criminal "pay offs", is lacking in substantive due process. To allow any man such as petitioner Levy, a practicing attorney with unblemished record for more than 35 years, to be used as prey by one such as Itkin, is to rip and destroy the fabric of substantive due process and the integrity of the proper administration of federal criminal justice.

2. It was prejudicial to petitioner Levy for the trial judge to permit Itkin to testify on redirect examination as to his so-called "state of mind" during his claimed, but unsupported, criminal activities in alleged contravention of his assigned duties. Itkin's narration on redirect examination of highly inflammatory and prejudicial matters concerning his self-styled "mission" to infiltrate the "underworld", which was ostensibly related to the jury solely on the issue of Itkin's "credibility", was grossly prejudicial to Levy.

There is set forth in this petition the essence of Itkin's redirect testimony. See pp. 11-14, *supra*. Apart from the fact that Itkin's testimony must be measured only in terms of his status as a government agent, the defense attack on his credibility was little justification for the trial judge to allow Itkin to testify on redirect examination in detail as to his purported "state of mind". Itkin was not on trial, although the extensive direct and cross examination made him the central character in this case. He made himself the central character by his claimed corrupt con-

duct and the nature of his testimony, but nevertheless he was always acting here as a government agent.

The "state of mind" or motivation of a government agent is not evidence in a case, even though his credibility is severely attacked. It was certainly not a proper basis for allowing Itkin to tell of the FBI's fear or concern for his life (S. M. 1793). It is to be noted that the trial judge permitted this statement to remain in the record, refusing to strike it or even to permit a proper statement to be made for an instruction to the jury. The prejudice of this testimony is clear.

The trial judge then compounded the prejudice of this type of testimony by telling the jury a most incomprehensible thing. He told the jury that this testimony "is not received for the truth of what was said by the witness or by third persons but solely on the issue of his credibility . . ." (S. M. 1796). It is hard enough for sophisticated and experienced trial lawyers to understand this kind of sophistical legal legerdemain, without expecting jurors (including those who cannot understand enough to remain sequestered in a hotel overnight) to understand it. All the jurors could know was that Itkin was telling them, with the express approval of the trial judge, of his mission to "infiltrate", at great personal sacrifice, and "concern" for his life. Such non-evidence was greatly prejudicial to the defendants on trial, and this prejudice far outweighed any possible probative value of Itkin's "state of mind". Moreover, his statement that the FBI was concerned for Itkin's life warranted a prompt repudiation by the trial judge. Instead, the trial judge did not strike it from the record and caution the jury, but instead overruled the objection to it. This was clearly prejudicial.

This instruction to the jury, that Itkin's redirect testimony was "not received for the truth of what was said . . . but solely on the issue of his credibility", flies in the

face of the rationale of *Bruton* v. *United States*, 391 U. S. 123 (1968), which overruled the concept of *Delli Paoli* v. *United States*, 352 U. S. 232 (1957), that jurors are presumed to follow this type of instruction. It is not even clear that the jurors understood what the judge was talking about. Objection to this instruction was immediately made by the defense (S. M. 1796 1797). It is to be noted, too, that this redirect testimony was both self serving and hearsay, offered in clear violation of the hearsay rule. Itkin's telling the jury what the "FBI" thought, felt and did in respect to his "mission" was clearly hearsay, not binding on the defendants and prejudicial in the context of this case.

3. The charge of the trial judge was not complete and fair in material respects, especially in light of petitioner's specific written requests to charge the jury and exceptions taken to the charge. This Court should resolve the conflict among the circuits as to the proper jury instructions to determine a defendant's membership in a criminal conspiracy.

Ordinarily, cases coming to this Court do not include arguments concerning the sufficiency of the trial judge's charge to the jury, but in this case in very material respects the charge of the trial judge requires review by this Court. Petitioner has set forth *in extenso supra* pp. 15-20, requests to charge which were not given in substantial form and which are the basis of his further argument that this case should be reviewed by certiorari.

Request to charge No. 9 relates to instructing a jury how to determine a defendant's participation in a conspiracy. In the Second Circuit the rule has developed that membership in a conspiracy may be based not alone on a defendant's acts, words and deeds, but on what another says about him. See *United States* v. *Naccio*, 373

F. 2d 168 (2nd Cir., 1967); *United States* v. *Ragland*, 375 F. 2d 471 (2nd Cir., 1967); *United States* v. *Geaney*, 417 F. 2d 1116 (2nd Cir., 1969) and *United States* v. *Baker*, 419 F. 2d 83 (2nd Cir., 1969). This rule conflicts with the rule in other circuits, to the effect that membership in a conspiracy may only be determined or based upon a defendant's own acts, declarations and conduct. See *United States* v. *Spock*, 416 F. 2d 165 (1st Cir., 1969) and *United States* v. *Fellabaum*, 408 F. 2d 220 (7th Cir., 1969). This conflict among the circuits should be resolved by this Court.

The failure to charge the jury on "specific intent" was clearly prejudicial. See Request No. 11, *supra* pp. 16-17.

The last request to which the Court's attention is invited is Request No. 13, dealing with the subject of "entrapment". See pp. 17-20 *supra*. The trial court's charge on entrapment is set forth at pp. 20-22, *supra*. In his exceptions to the trial judge's charge on entrapment (see S. M. 3678-3680), Levy's trial counsel referred to the fact that the court "instructed the jury that in order to find the issue of entrapment they would have to find that an agent of the government induced the offense to be committed by Mr. Levy". Counsel then cited two decisions of the Second Circuit, *United States* v. *Baic*, *supra* and *United States* v. *Riley*, *supra*, as holding that the entrapper could be an agent "or somebody acting under his orders and directions" (S. M. 3679). Counsel then referred to the *Riley* case as the basis for his exception to the charge that the burden of proof is on the defendant to show the inducement. The trial judge refused to correct his charge on this point (S. M. 3680).

In any criminal case where a defendant is said to have a "burden of proof", there is danger. Thus in the *Riley* case, *supra*, p. 958, Circuit Judge Friendly, writing for the

court, stated that the first element (inducement) "goes simply to the government's initiation of the crime and not to the degree of pressure exerted (citing cases), it can be argued with some force that submission to the jury is demanded whenever there is evidence that would warrant a finding of such initiation". This being so, there is no "burden" of proof on the defendant, to be charged as such to the jury and the whole issue of entrapment is to be submitted to the jury on the government's burden of proof that it did not induce the crime to be committed by the defendant or that the defendant was ready and willing without persuasion to commit the crime.

In other words, on this critical issue the trial judge shifted on to Levy a burden of proof he did not have, and thereby upset the rules relating to burden of proof. There was no definition of this "burden", and no statement of the requirements of the "ultimate burden of proof", which always rests on the government. Since the charge on this point was prejudicially erroneous, review by certiorari is warranted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG,
Counsel for Petitioner.

December 30, 1970

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

HAYS, *Circuit Judge*:

I.

Samuel Berger, Yvette Feinstein and Travis Levy appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York. The indictment under which they were convicted was in three counts, each charging conspiracy to pay illegal kickbacks to labor union welfare and pension fund officials in violation of 18 U.S.C. §371 (1964) and 18 U.S.C. §1954 (1964).

Count One was dismissed at the close of the government's case. Levy was found guilty as charged under Counts Two and Three; Berger and Feinstein were found guilty as charged under Count Three. Levy received concurrent sentences of two years' imprisonment and a fine of $10,000 on each count. Berger received a sentence of five years' imprisonment and a fine of $10,000. Feinstein received a suspended sentence and was placed on probation for two years. We affirm the convictions of Berger on Count Three and of Levy on Count Two, and reverse the convictions of Feinstein and Levy on Count Three.[1]

II.

Briefly described, the evidence introduced at trial detailed the efforts of Shiah Arsham,[2] who in late 1963 took

[1] The reversal of Levy's conviction on Count Three means only that he will be relieved from paying one of the fines imposed upon him.

[2] Arsham was named as a co-conspirator in all counts of the indictment. He testified as a witness for the government.

over the management of Cashmere Corporation of America of Cleveland, Ohio, a manufacturer of sweaters and yarn, to obtain desperately needed financing for the corporation. Shortly after he became president of Cashmere, Arsham sought the assistance of Travis Levy, a Manhattan attorney. In early 1964 Levy and Arsham made a number of attempts to obtain mortgage financing from various sources without success.

Finally Levy approached Stephen Birnbaum,[3] a New York City mortgage broaker, to discuss the possibility of obtaining a $1,500,000 mortgage loan for Cashmere from a labor union pension fund. In late May, Birnbaub proposed to his associate Herbert Itkin[4] that they develop the deal together. Various financial arrangements were made between the parties and Itkin enlisted the aid of James Plumeri,[5] who agreed to propose the Cashmere loan to the Furriers Union. Because of Cashmere's inability to obtain a promised appraisal of its assets, this deal fell through. By this time it had become necessary for Cashmere to obtain interim financing, while efforts continued to obtain a long term mortgage commitment.

The effort to obtain interim financing provided the basis for Count Two of the indictment. The government proved, primarily through the testimony of Itkin, that Itkin, on behalf of Levy and with his knowledge, made several illegal payoffs to Frank Zulferino,[6] the president of Local

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[3] Birnbaum testified as a witness for the government pursuant to a grant of immunity.

[4] Itkin testified as a witness for the government.

[5] Plumeri who was indicted on all three counts, became ill during the trial and a mistrial was declared as to him.

[6] Zulferino was indicted on all three counts, but a mistrial was declared as to him when his attorney died during the trial.

10 of the International Brotherhood of Production, Maintenance and Operating Employees in return for a letter of financial commitment purporting to obligate Local 10's welfare fund to provide Cashmere with a $1,200,000 mortgage loan. It was understood that the commitment would never be used, its agreed upon purpose being to convince banks to lend Cashmere short-term money. After several revisions of the letter and much in-fighting among the participants, Levy and Arshum in October 1964 received a commitment letter which they considered satisfactory. However the commitment did not prove helpful and they were still unable to obtain bank loans.

At the same time as the attempts to obtain interim financing on the basis of the Local 10 commitment were taking place, negotiations on the transaction which forms the basis of Count Three of the indictment were proceeding. The government proved, primarily through the testimony of Robert Graff,[7] a Chicago mortgage broker, that Graff, in collaboration with Berger, paid Floyd Webb,[8] a trustee of the Central States, Southeast, and Southwest Area Pension Fund of the International Brotherhood of Teamsters $20,000 in return for the Teamsters' giving Cashmere a mortgage of $1,500,000.

III.

Count Two

Levy concedes that if the jury believed Itkin they could have found Levy a knowing participant in the Local 10 kickback. However he argues that (1) it was improper to

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[7] Graff pleaded guilty to Count Three on the eve of trial and testified as a government witness.

[8] Webb died before the indictment was returned.

allow Itkin to testify as a co-conspirator; (2) Itkin's explanation of why he lied to the F.B.I. was improper and prejudicial; and (3) certain portions of the trial court's charges were erroneous.

Levy contends that since Itkin was not named as a co-conspirator in the indictment his testimony as to conversations he had with other alleged co-conspirators was hearsay and not admissible against Levy. This claim lacks merit since "it is enough if evidence, other than that whose admissibility is under challenge, disclosed . . . [a conspiracy]." *United States v. Annunziato*, 293 F.2d 373, 378 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

Independent evidence established that while Itkin was reporting to and working with the F.B.I. he continued to make illegal pay-offs on his own, contrary to F.B.I. instructions. Indeed he admitted that he lied to the F.B.I. in order to conceal his own illegal involvement in the Cashmere deals. On these facts it was entirely proper to admit his testimony as that of a co-conspirator.

On redirect examination Itkin testified that he lied to the F.B.I. to conceal the danger to his life that was involved in his activity.[9] The trial court instructed the jury as follows with respect to this evidence:

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[9] The portion of Itkin's testimony most strongly objected to is contained in the following colloquy:

> "Q. But you said also on cross-examination that you concealed various things from Agent Vericker [an F.B.I. agent]; correct? A. Yes, I did, sir.
>
> Q. Not only that, but you lied to him on many occasions; is that correct? A. Yes, I did.
>
> Q. Why did you lie? A. I lied for two reasons. One is that, as in this case, I lied to him in June of 1965. My part of the involvement was to a great extent over. Mr. Vericker had one overriding concern and that was more important than anything else and he always judged what we did by the concern for my life and . . ."

> "Ladies and gentlemen, this testimony of the witness is not received for the truth of what was said either by the witness or by third persons but solely on the issue of his credibility. On cross-examination he was asked certain questions as to why he did certain things and his state of mind. I am permitting the government on redirect to explore that solely on the question of credibility. What the witness said to somebody about the matter or what the FBI said to him about it is not evidence as to the truth of what was said, but it is evidence pertaining to the witness's state of mind and it will be up to you and you alone to determine at the conclusion of the trial the credibility of the witnesses and the weight that you extend to the testimony given by each."

There was no error in the admission of the testimony accompanied by this instruction. *United States* v. *Franzese*, 392 F.2d 954, 960 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). See also *United States* v. *Scandifia*, 390 F.2d 244, 251 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969).

Finally Levy argues that the trial court erred (1) in failing to charge that "specific intent" must be proven; and (2) in its charge on entrapment.

On the issue of intent, the trial court charged the jury:

> "I have used the words "Knowingly, unlawfully, wilfully. An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, accident, negligence or some other innocent reason. An act is wilful if it is done knowingly and deliberately."

This language was sufficient to inform the jury of the state of mind required to establish guilt. Further instruction on "specific intent" was unnecessary.

On entrapment the court charged:

> "In considering that issue [entrapment] bear in mind that the burden is on the defendant to adduce some evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant Levy has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that is, that the defendant Levy was ready and willing to commit the offense."

The charge is in accord with the position taken in this Circuit. See, e.g., *United States* v. *Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952), reversed on other grounds, 356 U.S. 369 (1958); *United States* v. *Henry*, 417 F.2d 267, 269-70 (2d Cir. 1969), cert. denied, 397 U.S. 953 (1973); *United States* v. *Gaidice*, 425 F.2d 886, 889-90 (1970).

IV.

Count Three

Feinstein and Levy both contend that the evidence was insufficient to allow the jury to conclude that either of them knew of or participated in the illegal kickback to Webb. We agree and therefore do not have to reach the other assignments of error urged by them.

A. Feinstein

On the crucial question of whether Feinstein knew that the illegal kickback was paid, all that appears is Graff's

testimony that "I asked Mr. Berger once if Mrs. Feinstein knew that Mr. Webb was being taken care of, that he was to be given $20,000, and he told me that she knew that Mr. Webb and I were friends and in the situation I was taking care of Mr. Webb, but, I mean, I wasn't there." On the other hand Graff stated specifically that he never told Mrs. Feinstein that he was going to give Floyd Webb $20,000 out of the funds he received in connection with the Central State loan to Cashmere.

The government showed only that Feinstein used her position and contacts to get for herself a $22,500 fee which she wanted to conceal, and that she was somehow associated with Berger and Graff.

We hold that the evidence against Feinstein was insufficient to go to the jury.

B. Levy

The evidence against Levy on Count Three showed only that Levy met with Feinstein and Graff to discuss financing for Cashmere, that at the time he asked Itkin's help in obtaining interim money for Cashmere from Local 10 Levy "guaranteed" to Itkin that the Teamsters would issue a loan commitment in a few months and that he promised that his Teamsters connections would get in touch with Itkin and Zulferino. It was also proved that Levy had an active part in helping Feinstein conceal payment of the $22,500 she received.

These facts fail to establish that Levy knew that Webb was paid an illegal kickback.

Appendix A
Opinion of U. S. Court of Appeals for the Second Circuit

C. Berger[10]

Appellant Berger concedes that Graff's testimony, if believed, was sufficient to allow the jury to find him guilty. However he argues that it was error for the trial court to deny his repeated motions for a severance and a separate trial. He contends that parts of the evidence introduced which pertained only to Count Two were so prejudicial to his case that we must reverse. In particular he submits that the testimony of Herbert Itkin requires this result.

Counts Two and Three were properly joined under Rule 8(b) Fed. R. Crim. P. Although the Local 10 commitment and the Teamster's loan were different transactions, they were clearly parts of "the same series of acts or transactions constituting an offense or offenses." *Id.* Levy's alleged participation in both transactions and the fact that in at least one important respect Itkin could have testified against Berger even in a separate trial[11] (see *United States* v. *Marti*, 421 F.2d 1263, 1271-72 (2d Cir. 1970)), justify the joinder as a substantial saving of judicial time.

[10] Berger does not press here, but preserves for further appeal the question of whether his Fifth and Sixth Amendment rights were violated when the prosecution, having been advised that he would assert his constitutional right not to testify and knowing that he was a "target" of the inquiry, nevertheless summoned him before the grand jury and forced him to invoke his rights before that body, which then proceeded to indict him. See, e.g., *United States* v. *Cioffi*, 413 F.2d 1306, 1328 (2d Cir.), cert. denied, 396 U.S. 958 (1969); *United States* v. *Wolfson*, 405 F.2d 779, 784-85 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

[11] Itkin described a meeting between Berger, Plumeri, Zulferino, Arsham and Itkin held in Berger's office in December, 1964 at which Plumeri threatened to stop the Teamsters' loan from going through. To prevent this, Berger guaranteed payment of $48,000 due on the unsuccessful Local 10 transaction, and agreed to halt Levy's attempt to demand repayment of monies given by Levy to Itkin to obtain interim union loans.

Appendix A
Opinion of U. S. Court of Appeals for the Second Circuit

While much of the evidence introduced at trial, including the bulk of Ilkin's testimony, concerned only Count Two, the transactions involved in Counts Two and Three were quite separate and there is little possibility that the jury could have failed to ascribe the evidence to the count to which it related. Moreover, the trial court's repeated limiting instructions provided an adequate safeguard against this possibility. See *Schaffer* v. *United States*, 362 U.S. 511 (1960); *United States* v. *Coralla*, 413 F.2d 1326, 1327-28 (2d Cir.), cert. denied, 396 U.S. 958 (1969); *Stern* v. *United States*, 409 F.2d 819, 820 (2d Cir. 1969) (per curiam). *Bruton* v. *United States*, 391 U.S. 123 (1968), relied on by defendant, does not hold that such limiting instructions are always ineffective. See *Frazier* v. *Cupp*, 394 U.S. 731, 734-35 (1969); *United States* v. *Coralla*, *supra* at 1327.

V.

Finally all of the appellants contend that the trial court committed reversible error by questioning a juror out of the presence of counsel after the jury had commenced its deliberations.

The jury deliberated during the afternoon and evening of Saturday, May 17, 1969, and was then sent to a hotel for the night. Before the jury met on Sunday morning to continue its consideration of the case the Court learned that one juror had left the hotel and spent the night at home with her husband. The Court questioned the juror and determined that she had misunderstood the instruction that the jury was to be sequestered, but that she had neither read about the case nor discussed it with anyone during here absence. "[C]onvinced that there had been no harm done," the Court permitted the jury to resume its deliberations.

When court convened shortly thereafter, counsel were notified of the incident. They claimed that since the trial court had not questioned the juror on the record, a mistrial was required. The Court denied that motion, recalled the juror and elicited on the record the same information as had previously been reported to counsel. None of the lawyers took up the Court's invitation to question the juror themselves.

While the better course for the trial court would have been to question the juror initially with counsel present, appellants can point to no prejudice resulting from the court's action. It certainly does not rise to the level of reversible error. See *United States* v. *Breland*, 376 F.2d 721, 722-23 (2d Cir. 1967).

Affirmed as to Berger, and as to Levy on Count Two. Reversed and indictment ordered dismissed as to Feinstein. Reversed and Count Three ordered dismissed as to Levy.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of October one thousand nine hundred and seventy.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

♦

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL BERGER, YVETTE FEINSTEIN, ROBERT GRAFF, TRAVIS LEVY, JAMES PULMERI, a k a JIMMY DOYLE, and FRANK ZUCCARINO,
Defendants,

SAMUEL BERGER, YVETTE FEINSTEIN, and TRAVIS LEVY,
Defendants-Appellants.

♦

Appendix B
Judgment of United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed as to appellant Samuel Berger and affirmed in part and reversed in part as to appellant Travis Levy with direction to dismiss Count Three of the indictment as applied to the said appellant Travis Levy in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgment as to appellant Yvette Feinstein be and it hereby is reversed with instructions to dismiss the indictment as to the said appellant Yvette Feinstein in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk

Appendix B

Order Denying Rehearing

33962, 34321-22

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMUEL BERGER, *et al.*,

Defendants,

SAMUEL BERGER, YVETTE FEINSTEIN and TRAVIS LEVY,

Defendants-Appellants,

(and 2 other cases).

A petition for a rehearing together with a motion in the alternative to stay issuance of the mandate having been filed herein by counsel for appellant Travis Levy,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied. The application for stay of mandate is granted.

HENRY J. FRIENDLY
J. JOSEPH SMITH
PAUL R. HAYS
Circuit Judges

November 11, 1970

Appendix B

Order Denying Petition

33962, 34321-22

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL BERGER, *et al.*,
Defendants,

SAMUEL BERGER, YVETTE FEINSTEIN and TRAVIS LEVY,
Defendants-Appellants,

(and 2 other cases).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Travis Levy and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

Dated: November 11, 1970.